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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

KATHLEEN LIGOCKI, Plaintiff and Appellant, v. WALT DISNEY IMAGINEERING et al., Defendants and Respondents.	B157518 (Los Angeles County Super. Ct. No. BC152935)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mary Ann Murphy, Judge. Affirmed.

Law Offices of Barry B. Kaufman and Barry B. Kaufman for Plaintiff and Appellant.

Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, Patricia L. Glaser and Joie Marie Gallo for Defendants and Respondents.

After her employment at Walt Disney Imagineering (WDI) was terminated, plaintiff and appellant Kathleen Ligocki sued WDI and The Walt Disney Company (collectively Disney), alleging, inter alia, gender discrimination, wrongful termination, and fraudulent inducement. Following a jury verdict in Disney's favor, Ligocki appeals, claiming that the trial court committed instructional and evidentiary error, improperly commented on the evidence, and erroneously failed to declare a mistrial. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Ligocki was offered the position of WDI's Senior Vice-President, Finance and Operations in January 1996 and began work at WDI on March 18, 1996. Ligocki was WDI's head financial executive and reported directly to Executive Vice-President and General Manager Ken Wong.

On April 19, 1996, Wong informed Ligocki that WDI would merge with another Disney subsidiary, the Disney Development Corporation (DDC), and that although she would retain her title, salary, and benefits with the merged company, she would report to the new company's Chief Financial Officer, DDC's Mitch Hill. Ligocki expressed dissatisfaction with the changes, argued that there was no longer a job for her in the new organization, and complained about the effect of the merger on the reporting channels for women in the company.

On the morning of April 23, 1996, Ligocki met with Wong and Ken Meyers, WDI's highest ranking Human Resources officer and a friend of Ligocki's, about Ligocki's position after the merger. Accounts of the meeting varied: Ligocki maintained that she said that she would continue to perform the job she was hired to do, but that she wanted other employment options, while Wong and Meyers recalled Ligocki refusing to accept the new position despite Wong's efforts to convince her that she would have the same opportunities and more responsibilities. Ligocki accused Wong of engaging in gender discrimination by giving the CFO job to Hill rather than to her. Later that day, Wong fired Ligocki.

Ligocki sued, alleging causes of action for breach of contract, wrongful termination/retaliation, fraudulent inducement, violations of Labor Code section 970, defamation, and gender discrimination. Ligocki dismissed the causes of action for defamation and breach of contract prior to trial.

After this court reversed summary judgment, the matter proceeded to trial in December 2001. The jury returned a special verdict in Disney's favor with unanimous findings that Disney had not engaged in gender discrimination or retaliation. The trial court denied Ligocki's motion for a new trial, and this appeal followed.

DISCUSSION

I. Asserted Instructional Errors

Ligocki claims that the trial court prejudicially erred when it refused to instruct the jury with four special instructions she requested and when it gave two instructions concerning at-will employment at Disney's request. "A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572 (*Soule*).)

A. Ligocki's Special Instruction No. 13

Ligocki requested the following instruction: "If you do not believe the reasons articulated by Defendant for the termination of Plaintiff—and you suspect dishonesty or deceit on the part of Defendant—you may reject the Defendant's reasons and infer the ultimate fact of intentional discrimination without additional proof so long as you believe that discrimination was the motivating factor (as that term is defined in these instructions)." Although the parties contest the accuracy of this instruction, we conclude that the instruction was properly refused because it was incomplete and potentially

misleading. (*Joyce v. Simi Valley Unified School Dist.* (2003) 110 Cal.App.4th 292, 303 ["An instruction correct in the abstract, may not be given where it . . . is likely to mislead the jury"].)

Ligocki's proposed instruction is derived from *St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502 (*St. Mary's*), in which the Supreme Court addressed the shifting burden of production in disparate treatment employment discrimination cases.[1] The initial burden of production rests on the plaintiff, who must make a prima facie case of discrimination. (*Id*. at p. 506.) Upon a prima facie showing, a presumption arises that the employer discriminated, and the burden of production shifts to the defendant to produce evidence of legitimate, nondiscriminatory reasons for its actions. (*Id*. at pp. 506-507.) The defendant's production of this evidence successfully rebuts and eliminates the presumption of discrimination (*id*. at p. 507), and "the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven 'that the defendant intentionally discriminated against [him [or her]]' because of his" or her membership in a protected class. (*Id*. at p. 511.) In making the ultimate finding, the fact finder's "disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, *together with the elements of the prima facie case,* suffice to show intentional discrimination." (*Ibid*., emphasis added.) Rejection of the defendant's justifications does not compel judgment for the plaintiff because the plaintiff bears the ultimate burden of persuasion at all times and because of "the fundamental principle of [Federal Rule of Evidence] Rule 301 that a presumption does not shift the burden of proof. . . ." (*Ibid*.)

The proposed instruction disregards the "together with the elements of the prima facie case" component of the analysis (*St. Mary's*, *supra*, 509 U.S. at p. 511) and suggests, inaccurately, that falsity alone establishes liability. If given, the instruction could have misled jurors into believing that if they disbelieved Disney's justifications,

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[1] The California Supreme Court has adopted this analysis for discrimination claims made under state law. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354.)

and if they "suspected" Disney was dishonest or deceitful in any way, then they could conclude that discrimination had occurred. Although the instruction does state that the jury may infer discrimination only "so long as" it "believes" that discrimination was the motivating factor in the employer's actions, this phrase is tacked on as if it were an afterthought rather than the ultimate question. The instruction does not define "believing" as concluding that the plaintiff has proven by a preponderance of the evidence that gender was a motivating factor in the employment action. The instruction therefore fails to communicate that in order to find for Ligocki, not only must the jury conclude that Disney's justification for Ligocki's termination was false but *also* that it was a pretext for gender discrimination. (See *id*. at pp. 515-516, 523-524 [antidiscrimination law "does not award damages against employers who cannot prove a nondiscriminatory reason for adverse employment action, but only against employers who are proven to have taken adverse employment action by reason of" membership in a protected class"].) Because it could have caused the jury to "substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable" (*id.* at pp. 514-515), the trial court properly declined the proposed instruction.

B. Ligocki's Special Instruction No. 6

Ligocki complains that the court improperly refused to give this proposed instruction: "In a discrimination case, the employee must show that the employer harbored a discriminatory intent. This may be proven by means of direct evidence that unlawful discrimination played a motivating part in the challenged employment decision, or by circumstantial evidence. Direct evidence of an employer's intent is very difficult to obtain and presents an elusive factual question. This is because there is seldom 'eyewitness' testimony to the employer's mental processes."

"In instructing a jury it is sufficient if the court gives a well balanced statement of the essential legal principles necessary to guide them in their deliberations, and when that

is done a party is not prejudiced by refusal to give an additional instruction merely because it may be said to be applicable to the case from the viewpoint of the party offering it." (*Cucamonga County Water Dist. v. Southwest Water Co.* (1971) 22 Cal.App.3d 245, 266.) Here, the instruction was properly declined because the legal principles it stated were covered by other instructions and the remaining content was not appropriate for a jury instruction.

Of the proposed instruction's four sentences, only the first two were legally instructive. The content of these sentences—that the employee must prove discriminatory intent and that intent may be proven by direct or circumstantial evidence—was covered by standard instructions given to the jury. BAJI No. 2.00 defines direct and circumstantial evidence and instructs jurors that both are acceptable: "The law makes no distinction between direct and circumstantial evidence as to the degree of proof required; each is a reasonable method of proof." BAJI No. 12.01, given as tailored to the case, instructs the jury on the elements of a discrimination claim, including the requirement that the "plaintiff's gender was a motivating factor in the defendant's decision or termination," and the term "motivating factor" was defined by BAJI No. 12.01.1. "It is not error, of course, to refuse to give an instruction requested by a party when the legal point is covered adequately by the instructions that are given." (*Arato v. Avedon* (1993) 5 Cal.4th 1172, 1189, fn. 11.)

The final two sentences of this instruction, dubbed the "important" sentences by Ligocki's counsel, concerned the difficulty of proving discrimination by direct evidence. These sentences were inappropriate for a jury instruction because they did not convey to jurors "matters of law . . . necessary for their information in giving their verdict" (Code Civ. Proc., § 608) but presented plaintiff's argument about how to view and weigh the evidence favorably to her. (*People v. Gurule* (2002) 28 Cal.4th 557, 659 ["a trial court may refuse a proffered instruction if it is an incorrect statement of law, is argumentative, or is duplicative"]; *People v. Carter* (2003) 30 Cal.4th 1166, 1226 [proper to refuse as argumentative a proposed instruction "inviting the jury to draw inferences favorable to only one side"].)

Because the instructions that were given covered all the legal principles contained in Ligocki's proposed instruction, the court did not err when it rejected this instruction.

C. Ligocki's Special Instruction No. 9

The trial court refused an instruction proposed by Ligocki that read, "The employer's explanation for its employment action may be inferred to be false (a) from the timing of the company's termination decision, (b) by the identity of the person making the decision, and (c) by the terminated employee's job performance before termination." Ligocki argues that the instruction should have been given because it is nearly all quoted from *Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138 (*Sada*), which has not been disapproved or depublished, and because *Sada* is the law of the case, having been cited by this court in its previous opinion reversing an earlier grant of summary judgment in this action.

Ligocki's arguments do not establish error. First, the law of the case doctrine has no application here. An appellate court's citation of a decision in an opinion reversing a summary judgment does not establish that a jury instruction developed from that decision will be necessary or appropriate at a subsequent trial on the merits. Second, whether an instruction quotes or closely paraphrases a decision is not the standard for an appropriate jury instruction. (*Bell v. Seatrain Lines, Inc.* (1974) 40 Cal.App.3d 16, 27 [noting the "danger of translating appellate rhetoric into jury instructions" and commenting that "[t]he fact that a jury instruction is copied from an appellate opinion unfortunately is no guarantee that it is not argumentative, negatory or prolix"]; *Williams v. Carl Karcher Enterprises, Inc.* (1986) 182 Cal.App.3d 479, 487 [extracting jury instructions from appellate opinions "tend[s] to produce instructions which are repetitive, misleading and inaccurate statements of the law as to the particular case"], overruled on other grounds in *Soule*, at pp. 574-581.)

The trial court properly refused Ligocki's proposed instruction, which was drawn from a passage in *Sada* that read, " . . . 'Pretext may . . . be inferred from the timing of

the company's termination decision, by the identity of the person making the decision, and by the terminated employee's job performance before termination.' [Citation.]" (*Sada*, *supra*, 56 Cal.App.4th at p. 156.) Ligocki replaced the subject of the original sentence from the decision—*pretext*—with *falsity*, creating an instruction that provided that an "employer's explanation for its employment action may be inferred to be false" based on the three factors. "Falsity" and "pretext" are not synonymous in this context, however, for "pretext" refers to a pretext for discrimination and this requires a finding of intentional discrimination in addition to falsity. (*St. Mary's*, *supra*, 509 U.S. at p. 515-516 ["a reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason"].) Much like Ligocki's Special Instruction No. 12, because of its focus on inferring falsity this instruction inaccurately suggests that falsity is all that must be found in order to conclude that intentional discrimination has occurred. This is not the law. As the Supreme Court has emphasized, "It is not enough . . . to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination." (*Id.*, at p. 519.) Ligocki's misleading instruction was properly refused. (*Joyce v. Simi Valley Unified School Dist.*, *supra*, 110 Cal.App.4th at p. 303.)

D. Ligocki's Special Instruction No. 12

The trial court instructed the jury that "Where the same person is responsible for the hiring and the firing of a plaintiff claiming discrimination, and both actions occur within a short period of time, a strong inference arises that there was no discriminatory motive." Ligocki claims that the court should also have instructed the jury, "Just because the same decisionmaker who hired an employee is also the person who fired the employee does not mean that intentional discrimination may not have occurred. If you find that circumstances changed between the time of hiring and the time of firing, then [the] strong inference of non-discrimination is removed."

Ligocki argues that her instruction was necessary to "balance and mitigate against [Disney's] 'strong inference' special instruction." Jury instructions, however, are intended to inform the jury of applicable legal principles, not to present competing argumentative versions of the law. (Code Civ. Proc., § 608; *Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 335 [court's duty is to give instructions that "embrace all the points of the law arising in the case"].) "A party is not entitled to have the jury instructed in any particular phraseology and may not complain on the ground that his requested instructions are refused if the court correctly gives the substance of the law applicable to the case." (*Hyatt*, at p. 335.)

The first sentence of Ligocki's proposed instruction was identical in content to the instruction given by the court except that Ligocki's instruction emphasized that the jury was not compelled to infer a nondiscriminatory motive. This was a proper argument to the jury, but not a necessary instruction because another instruction stated the law. (*Kraft v. Nemeth* (1952) 115 Cal.App.2d 50, 54 ["It is not error to refuse instructions which . . . would serve only to emphasize unduly a party's theory of the case and which so far as they contain correct statements of the law are adequately covered by the instructions given"].) "The court is not required to instruct in the specific words requested by a party so long as the jury is adequately instructed on the applicable law." (*Traxler v. Varady* (1993) 12 Cal.App.4th 1321, 1332.)

The remainder of Ligocki's proposed special instruction declared that an inference of nondiscrimination is "removed" if unspecified "circumstances changed between the time of hiring and the time of firing." Neither case cited by Ligocki stands for this principle. In *Brown v. Stites Concrete, Inc.* (8th Cir. 1993) 994 F.2d 553, the court held that the evidence was sufficient to support an award of liquidated damages, commenting in a footnote that the fact that the same person hired and fired the plaintiff does not prove that the employer could not have discriminated on the basis of age. (*Id*. at p. 567, fn. 8.) In *Johnson v. Group Health Plan, Inc.* (8th Cir. 1993) 994 F.2d 543, the Eighth Circuit rejected the argument—in defense of a summary judgment—that a triable issue of material fact as to discriminatory intent could not be established because the same person

(Siegal) hired the 55-year-old plaintiff (Johnson), then fired her two years later. The court wrote, "Considering the background facts, we believe it is credible that Siegal would hire Johnson in 1989, make use of Johnson's experience during the transition period [as it took over a business for which she had worked for many years], and then terminate her because of her age." (*Id*. at p. 548.) From the very different factual and procedural circumstances of these two cases Ligocki fashioned a rule of law that changed circumstances conclusively rebut a presumption of nondiscrimination. As neither *Brown* nor *Johnson* established such a rule, the court properly declined to give the instruction.

E. Disney's Special Instruction Nos. 1 and 2

The jury was instructed that "There is a legal presumption that employment for an unspecified term is terminable at will, at any time or for any reason," and "An at-will employee may be terminated at any time or for any reason so long as it is not an unlawful reason or a purpose that contravenes public policy." Although she does not dispute the accuracy of these instructions, Ligocki argues that they were irrelevant and should not have been given because at-will employment status was not a defense to the causes of action that were tried.[2]

Whether a jury instruction states a defense is not the measure of its relevance. (Code Civ. Proc., § 608 [court instructs jurors on "all matters of law which it thinks necessary for their information in giving their verdict"].) A defendant is not restricted to requesting instructions that discuss defenses but is entitled to instructions on "every

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[2] Ligocki submits two juror declarations to establish that the instructions caused confusion. As declarations concerning jurors' subjective mental processes or those of the jury as a whole are inadmissible (Evid. Code, § 1150, subd. (a); *People v. Hutchinson* (1969) 71 Cal.2d 342, 349-351; *People v. Steele* (2002) 27 Cal.4th 1230, 1260-1261; *Ford v. Bennacka* (1990) 226 Cal.App.3d 330, 336), we do not consider these declarations in evaluating this claim.

theory of the case advanced by him which is supported by substantial evidence." (*Soule*, *supra*, 8 Cal.4th at p. 572.)

The instructions were relevant to Disney's theory that Ligocki was fired for legitimate reasons. "[T]he starting point for all employment cases is the presumption of at-will employment. [Labor Code s]ection 2922 provides that '[a]n employment, having no specified term, may be terminated at the will of either party on notice to the other.' The tort of wrongful termination in violation of public policy is an exception to the statute." (*Cabesuela v. Browning-Ferris Industries of California, Inc.* (1998) 68 Cal.App.4th 101, 107.) It was undisputed that Ligocki was an at-will employee and that WDI terminated her employment. Disney presented evidence of a nondiscriminatory, nonretaliatory basis for firing her: refusal to accept the changes in her employment that were caused by the merger. As the trial court summarized, "That's their theory of the case; that she was an at-will employee, she was terminated, don't need cause, just need it not to be an illegal reason. It wasn't an illegal reason, it wasn't gender based, they didn't commit fraud. Therefore, it wasn't." Disney's evidence and trial theory directly raised the question of permissible versus actionable grounds for terminating at-will employment.

Accordingly, the court instructed the jury that an at-will employee may be terminated at any time or for any reason—so long as it is not an unlawful reason or a purpose that contravenes public policy. The court also instructed that "The termination of an employee by an employer in violation of public policy is a wrongful termination. An employee who was terminated in violation of public policy is entitled to recover damages from the employer," and that "To establish a termination of employment in violation of public policy, it must be established that plaintiff's employment was terminated as a result of the defendant's violation of a public policy. [¶] The public policy of the State of California is that a person cannot be terminated from her employment by reason of her gender, or because she complains to her employer of its alleged discriminatory employment practices." These instructions informed the jury that although at-will employees may be fired for any reason that does not violate public

policy, retaliatory or discriminatory firing violates public policy, is wrongful, and entitles the employee to damages. The instructions enabled the jury to evaluate Ligocki's firing according to California law and were therefore proper.

F. Prejudice

"[T]here is no rule of automatic reversal or 'inherent' prejudice applicable to any category of civil instructional error, whether of commission or omission. A judgment may not be reversed for instructional error in a civil case 'unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' (Cal. Const., art. VI, § 13.)" (*Soule*, *supra*, 8 Cal.4th at p. 580.) Civil instructional error is prejudicial when it seems probable that the error prejudicially affected the verdict in light of its impact on a party's ability to place its case before the jury, the state of the evidence, the effect of other instructions, the effect of counsel's arguments, and any indications by the jury that it was misled. (*Id*. at pp. 580-581.)

Prejudice must be affirmatively demonstrated by the party seeking reversal. (*Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069.) Even assuming that the trial court had committed instructional error, Ligocki has failed to establish that the court's alleged instructional errors denied her the ability to present her case to the jury in full or to argue discrimination and retaliation; that the jury was misled by the instructions given; or that based on the state of the evidence, a more favorable result would have been obtained in the absence of the instructional errors she has alleged. Her failure to demonstrate prejudice bars reversal of the judgment on the basis of instructional error.

II. Exclusion of Evidence

A. Jessica Rabbit and Cher Images

Ligocki attempted to introduce photographs of the singer and actress Cher and images of the animated character Jessica Rabbit from the film, Who Framed Roger Rabbit? (Touchstone Pictures 1988) that were displayed in the office of Ken Meyers, a friend of Ligocki's and WDI's highest-ranking human resources officer. The court ruled that because Ligocki was not alleging hostile environment discrimination, unless she could establish that Meyers had participated in the decisions concerning her post-merger position or firing, the images would not be admitted.

Ligocki argues that she made the foundational showing required by the court's ruling and that the images should have been admitted to impeach both Wong and Meyers. She claims they would have "impeach[ed] the credibility of Wong, the person who apparently approved or condoned Meyers' display of the sex-biased pictures in the WDI offices by not doing anything about them . . . ." and that they would have impeached Meyers on the "disputed fact issue" of whether Meyers had ever acted unprofessionally in the workplace. She also argues that the images explained why Ligocki so quickly accused Wong of gender discrimination. Ligocki accuses the trial court of "elevat[ing] a subpoenaed witnesses' [*sic*] vacation plans . . . over a party's right to get the truth out." (Italics omitted.)

We review the trial court's ruling for an abuse of discretion. (*In re Marriage of Slayton & Biggums-Slayton* (2001) 86 Cal.App.4th 653, 661.) The court did not rule merely on the basis of availability, as Ligocki contends, but considered Meyers's unavailability—and the timing of plaintiff's argument—as two of the factors in the balance under Evidence Code section 352. Ligocki's counsel had previously attempted to surprise witnesses with new last-minute lines of questioning at trial, causing the court to criticize "these little zingers right at the end in redirect . . . ." Then, in the midst of trial, Ligocki's counsel sought to introduce not only the Cher and Jessica Rabbit images,

but also the testimony of a Disney employee (Tami Garcia) offended by them, and testimony by Ligocki that the images were part of the reason she alleged gender discrimination. Ligocki's counsel raised the issue the trial day after Meyers became unavailable. Seeking to justify the timing, counsel explained that Meyers's testimony had unexpectedly implicated Meyers's professionalism and that Ligocki had only just told him that she needed to mention the images.

The court noted that the issue of the images had been raised by motion in limine and that the professionalism question was raised only at the end of Ligocki's examination of Meyers. The court also observed, "And this is coming up for the first [time on the first] business day after . . . Mr. Meyers finished testifying . . . . All of a sudden your client remembers for the first time . . . that these pictures made her feel this way . . . ." The court said, "The critical and highly prejudicial situation that we are faced with here is that after having a full-day hearing [on the motions in limine], completely flushing out this issue, giving as much time to everyone as they wanted to have on these motions, after Mr. Meyers is gone for good, the plaintiff says something to her attorney and now her attorney wants to offer some additional testimony that was not flushed out at the hearings on the motion in limine. [¶] The relevance is marginal. This is not a hostile work environment case, although it could be said that, yes, it is somehow relevant. However, Mr. Meyers is gone. There was the opportunity for him to respond to this, for him to give his side of the story. Now there's no opportunity whatsoever. He's out of state on vacation with his family, after flying down from San Francisco three times [to testify]. [¶] . . . This is the third round of motion in limine arguments on defense motion in limine number 4. Round number 1 was . . the motion in limine hearing. The plaintiff was not present for that. Round number 2 was in the middle of trial, and plaintiff sat through that entire hearing. . . . [¶] And then suddenly, after Mr. Meyers is gone and cannot come back, the plaintiff tells her attorney that this other thing is relevant . . . ."

The court concluded that the evidence was inadmissible under Evidence Code section 352: "Meyers did not participate in the decision to terminate plaintiff. The ruling on the motion in limine was that the documents don't come into evidence unless the

plaintiff can prove something, enough to get to the jury on Mr. Meyers terminating or participating in the decision to terminate the plaintiff or what job she would be offered as a result of the merger. There's nothing in the record. [¶] Under [Evidence Code section] 352, I think the prejudice with Mr. Meyers out of town, as opposed to what the prejudice would have been before 2 o'clock on Monday, is extreme. There would be no chance for the defendants to rebut this testimony. And this goes for the deposition of Tami Garcia and the deposition of the plaintiff. It would be extreme prejudice and that would substantially outweigh the relevance." The court further commented that Ligocki's new admissibility argument created extreme prejudice because it was so belatedly raised. The court refused to admit the images or permit testimony about them.

The trial court did not abuse its discretion. Unless Ligocki had established that Meyers participated in the decision of what position she would hold after the merger or the decision to terminate her employment, the probative value of the images was slight at best. There was no evidence of Meyers's participation. Both Meyers and Wong unequivocally testified that Wong was the person who decided to give Hill the CFO job in the post-merger company and who chose to fire Ligocki; Meyers was not involved in either decision. Although Wong "check[ed] his thinking" with Meyers before terminating Ligocki's employment, that Wong made sure he was not "missing something" with Meyers does not establish that Meyers participated in the decision to fire her. To the contrary, because of Meyers's friendship with Ligocki, Wong did not want to place Meyers in the awkward position of being involved in the termination decision. Ligocki presented no contradictory evidence.

Because Meyers was not involved in either employment decision, the presence of allegedly inappropriate images in his office establishes little, if anything, about the biases or motivations of the decision makers. In contrast, the prejudicial impact of the images and their eleventh-hour admission after Meyers became unavailable would have been significant. The trial court did not abuse its discretion in ruling that any probative value of the images was outweighed by their prejudicial impact.

B. Exhibit 103

Ligocki attempted to question Wong about exhibit 103, a handwritten organizational chart written by Wong's former boss, Peter Rummell. The court ruled that Ligocki had established the authenticity of the document through Wong's testimony that he recognized Rummell's handwriting, but sustained Disney's hearsay objection. The trial court then granted Ligocki's request to examine a Disney custodian of records at a mid-trial Evidence Code section 402 hearing. When Ligocki moved to introduce the statement into evidence after the hearing, the trial court ruled the document inadmissible hearsay because Ligocki had established only that the document had been written by Rummell and produced by Disney. Ligocki claims on appeal, as she did in the trial court, that the document is admissible both as a business record—because Disney "produced it from its own internal files" (underlining omitted)—and under the state-of-mind exception to the hearsay rule. The trial court did not abuse its discretion in ruling that Ligocki had failed to establish that Rummell's handwritten notes were admissible.

Evidence Code section 1271 excepts from the hearsay rule documents that were made in the regular course of business and at or near the time of the act, condition, or event they are offered to prove, as long as a qualified witness testifies to the identity and mode of their preparation and the sources of information and method and time of preparation were such as to indicate their trustworthiness. Ligocki failed to establish any of these elements. Both at trial and on appeal her counsel has blamed this on Disney, claiming Disney deliberately produced a custodian of records who was unable to testify to these elements—but, as the trial court observed, it could not imagine any custodian of records who could establish the elements of the business records exception with respect to an individual employee's handwritten notes.

Ligocki claims she was denied "any meaningful opportunity" to demonstrate exhibit 103's admissibility at the mid-trial evidentiary hearing, but the record reveals that the trial court gave her wide latitude to lay a foundation for its admissibility despite the untimeliness and procedural irregularities of Ligocki's mid-trial subpoenas and her

failure to secure the information during discovery. Ligocki could not establish the document's admissibility because her counsel erroneously believed that any document generated by an employee and possessed by a company was admissible under the business records exception to the hearsay rule. Accordingly, after Disney refused his request to stipulate "that the documents produced by them in discovery are at least *authentic business records*, putting aside the hearsay" issue, Ligocki's counsel focused on the document's "chain of custody" and method of production during discovery. He subpoenaed Disney's custodian of records, the person who signed the verifications that accompanied two of Disney's document productions, and the defense attorney who coordinated the document production in which exhibit 103 was produced. Ligocki's inability to establish the elements of the business records exception at the evidentiary hearing was not due to limits imposed by the trial court but to the inherent impossibility of establishing the admissibility of Rummell's handwritten notes in her chosen manner.

Nor was exhibit 103 admissible under the state-of-mind exception to the hearsay rule. Through exhibit 103, an organizational chart drawn up by Rummell that contemplated Hill as the post-merger CFO and Ligocki reporting to Hill, Ligocki sought to establish that in February 1996 Wong knew of the impending merger and that Hill would receive the head financial officer position over Ligocki—but that Wong concealed this information from Ligocki. A document written by Rummell, however, is not admissible to prove Wong's state of mind. (Evid. Code, § 1250 [evidence of a statement of *the declarant's* then-existing state of mind is not inadmissible hearsay when offered to prove *the declarant's* "state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action"].)

Ligocki argues that Rummell's state of mind was at issue because Wong and Rummell talked about the possible merger regularly in February 1996 and Wong moved forward with merger arrangements when directed to by Rummell: "Wong's story put Rummell's 'state of mind' directly in issue because of his claim that he was merely carrying out the latter's orders and directives." Even if this argument were accepted, it would not place at issue Rummell's state of mind about the merger in general. It would

only place at issue those plans and views about the merger *that were conveyed to Wong*, for Wong was the person alleged to have fraudulently concealed the merger plans from Ligocki. The fact that Wong carried out his supervisor's orders does not establish that Rummell's state of mind was shared with, or shared by, Wong. There was no evidence that Wong had seen exhibit 103 or knew of its contents before Ligocki began working at WDI.

Under these circumstances, Wong could not be impeached with this hearsay document written by Rummell. (*Campbell v. Genshlea* (1919) 180 Cal. 213, 220-221 [a letter written by a person not the witness and for which the witness is not responsible in any way is not admissible to contradict the witness's testimony, even though statements in the letter were inconsistent with the witness's testimony]; see also *LeGrand v. Yellow Cab Co.* (1970) 8 Cal.App.3d 125, 132 [interrogatory answers could not be used to impeach witness without evidence that the witness prepared them, read them, or was informed of their contents].) As Ligocki did not establish that exhibit 103 was admissible under any exception to the hearsay rule, the trial court did not abuse its discretion in excluding it.

III. Alleged Trial Court Misconduct

Ligocki's counsel argued in closing that "Defendants want you to find against WDI only so that there will be a bank account with zero in it. It's the old carnival—" The trial court interjected, "There's no evidence of that. Let's stick to what we heard about in the trial, please." Without requesting a sidebar conference, Ligocki's counsel responded that Disney was engaging in "a shell game." The court said, "That's not relevant on that instruction," and directed counsel, "Let's move on." Ligocki characterizes these statements as a comment on the evidence, invokes the rule of Code of Civil Procedure section 608 that whenever the court comments on testimony, it must admonish the jurors that they are the ultimate judges of the facts, and argues that the trial court committed reversible error by failing to give BAJI No. 15.21. She argues that

prejudice should be "presumed," and offers juror declarations that the court's statements "influenced the vote." We disregard these declarations because they purport to recount the jurors' subjective thought processes. (Evid. Code, § 1150, subd. (a).)

The trial court's instruction to Ligocki's counsel to move on from the subject of WDI's bank account was proper because there was no evidence to support his argument. Because the parties had stipulated to bifurcate the trial with respect to punitive damages, no evidence had been received from which it could be inferred that the post-merger WDI had an empty bank account at any time, past or present.[3] It is improper for counsel to argue facts not in evidence. (*Malkasian v. Irwin* (1964) 61 Cal.2d 738, 746-747.) Accordingly, the trial court appropriately instructed counsel to "stick to" the evidence and to proceed. This intercession to prevent improper argument of counsel (*Sabella v. Southern Pac. Co.* (1969) 70 Cal.2d 311, 320-321 & fn. 8) may not reasonably be interpreted as a comment on the evidence and did not interfere with counsel's fully-presented joint employer arguments.

IV. Denial of Mistrial Motion

Disney briefly displayed two exhibits that included inadmissible information about the salary Ligocki earned in her post-WDI employment. The court polled the jury about whether any jurors had seen the salary number, and only one—an alternate—had seen it. That alternate juror remained an alternate and did not participate in deliberations. Ligocki moved for a mistrial because of the display and because Disney twice violated the court's order that the salary information was inadmissible. Acknowledging that it had inadvertently authorized Disney to display one of the exhibits containing the salary figure, the court found no misconduct and denied Ligocki's motion because no prejudice

[3] There was testimony that The Walt Disney Company was the source of WDI's operating revenues, but no evidence about the amount of funds WDI possessed.

had resulted from the display of the information. We review the ruling for an abuse of discretion. (*People v. Cox* (2003) 30 Cal.4th 916, 953.)

"A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction" (*People v. Haskett* (1982) 30 Cal.3d 841, 854), but "' . . . may properly be refused where the court is satisfied that no injustice has resulted or will result from the occurrences of which complaint is made.' [Citations.]" (*People v. Romero* (1977) 68 Cal.App.3d 543, 548.) Because no sitting juror saw the salary number, no prejudice or injustice resulted from the brief display of inadmissible information. The trial court did not abuse its discretion by denying a mistrial.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.